

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



**ORIGINAL 74-1835**

In The  
**United States Court of Appeals**  
For The Second Circuit

SHATTUCK DENN MINING CORPORATION,

*Plaintiff-Appellant,*

vs.

WILLARD J. LA MORTE,

*Defendant-Appellee.*

*On Appeal from the United States District Court, Southern  
District of New York.*

**BRIEF OF DEFENDANT-APPELLEE,  
WILLARD J. LA MORTE**

FELDSHUB & FRANK

*Attorneys for Defendant-Appellee*

144 East 44th Street

New York, New York 10017

687-8930

DONALD A. DERFNER

ROBERT BARTELS

*Of Counsel*

(7772)

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES, STATUTES & AUTHORITIES	11
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	3
Counter Statement of Facts	4
ARGUMENT	
POINT I - Upon this §16(b) Federally Created Right, Plaintiff's Recovery For Short-Swing Profits is Jurisdictionally Limited to Profits, If Any, Which Defendant "Realized" Only Within Two Years Prior To The Commencement of This Action.	8
POINT II - The Critical Valuation Date of The Shares of Fireproof Products Co., Inc., Is December 31, 1964.	22
POINT III - Only La Morte's Pro Rata Share of Any Partnership Profits Realized on Transactions in Shattuck Stock Was Subject to Recapture by Shattuck Under §16(b).	33
POINT IV - The District Court's Method of Determining La Morte's §16(b) Liability Was Incorrect	39
POINT V - La Morte is Entitled to Recover Interest on the Sum Paid to the Plaintiff in Excess of His §16(b) Liability.	48
CONCLUSION	50
APPENDIX A	52
APPENDIX B	54

# TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
Adler v. Klawans, 172 F.Supp.502 (S.D.N.Y. 1958). Aff'd. 267 F.2d 840 (2d. Cir. 1959)	43
Atlantic City Electric Co. v. General Electric, 312 F. 2d 236 (2d. Cir. 1962)	17
B.T. Babbitt, Inc. v. Lachner, 332 F.2d 255 (2d Cir. 1964)	27
● Blau v. Albert, 157 F.Supp. 816 (S.D.N.Y. 1957)	14,15
Blau v. Allen, 163 F. Supp. 702 (S.D.N.Y. 1958)	43
Blau v. Lamb, 163 F. Supp. 528 (S.D.N.Y. 1958)	26
Blau v. Lehman, 173 F.Supp. 590, 593-594 (S.D.N.Y. 1959), aff'd 286 F.2d 786 (2d Cir. 1960); aff'd 368 U.S. 403 (1962)	34
Carr-Consolidated Biscuit Co. v. Moore, 125 F.Supp. 423 (M.D. Pa. 1954)	15,20
Champion Home Builders Company v. Jeffress, CCH Federal Securities Law Reports, ¶93, 914 (E.D. Mich. 1973)	24
Feder v. Martin-Marietta Corp., 406 F.2d 260 (2d.Cir. 1969)	34
Fistel v. Christman, 135 F.Supp. 803 (S.D.N.Y. 1955)	27
Glus v. Brooklyn Eastern District Terminal 359 US 231 (1959)	18
Gratz v. Slaughteron, 187 F.2d 46 (2d. Cir.), cert.den., 43 341 U.S. 920 (1951)	43
Grossman v. Young, 72 F. Supp. 375 (S.D.N.Y. 1947)	11,14,15,19
Herget v. Central Nat.Bank, 324 U.S.4 (1945)	13

<u>CASES</u>	<u>Page</u>
Holmberg v. Ambrecht, 327 U.S. 392; 66 Sup.Ct. 582, 90 L.Ed. 743 (1946)	12,13,17,18,19
International Railways of Cent.Am. v. United Fruit Co., 373 F. 2d 408, 414 (2d. Cir. 1967)	17
Kern County Land Co. v. Occidental Petroleum, 411 U.S. 582 (1973)	25,41
Kramer v. Ayer, 317 F.Supp. 254 (S.D.N.Y. 1970)	26
Marquette Cement Manufacturing Co. v. Andreas, 239 F. Supp. 962 (S.D.N.Y. 1965)	27,34
Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80, 87 (2d. Cir. 1961)	16
Mueller v. Korholz, 449 F.2d 82 (7th Cir.1971)	30, 2 <sup>6</sup>
Newmark v. R.K.O., 425 F.2d 348 (2d. Cir. 1970)	24,27
Osbourne v. United States, 164 F.2d 767, 768 (2d Cir. 1947)	10,12
Park & Tilford v. Shulte, 160 Fed. 2d 984 (2d. Cir. 1947)	26
Pollen v. Ford Instrument Co., Inc., 108 F.2d 762 (2d. Cir. 1940)	9,10,12
Provident Securities Co. v. Foremost-McKesson, CCH Fed.Sec. L. Rpt. ¶94,811 (9th Cir.1974)	25,41
Rattner v. Lehman, 193 F. 2d 564 (2nd Cir. 1952)	34

## CASES

### Page

Stella v. Graham-Paige, 132 F.Supp. 100 (S.D.N.Y. 1955), aff'd. 232 F.2d 299 (2d.Cir. 1959), cert. den., 352 U.S. 931 (1956)	41
Smolowe v. Delendo Corp. 136 F. 2d 231 (2nd Cir. 1943)	42
The Harrisburg v. Richards, 119 U.S. 199; 30 L. Ed. 358, (1886)	9,10,12,18
Walet v. Jefferson Lake Sulphur, 202 F.2d 433 (5th Cir. 1953)	43
Westinghouse Electric Corp. v. Pacific Gas & Electric Co., 326 F. 2d 575 (9th Cir.1964)	18

## STATUTES

Securities and Exchange Act of 1934 - §16(b)	8,12,14,16,17,18, 19,20,21,33,34,35, 36,37,39,40,42,44, 45,46,47,49,50,51
---	--

## OTHER AUTHORITIES

H. R. 7952 and S. 2693, 73rd Cong., 2nd Sess. (1934)	49
American Law Institute's Restatement of the Law of Restitution, Sec.19 Sec.20	48,49
61 Harvard Law Review, 368	9,12
Painter, Federal Regulation of Insider Trading, 25-40 (1968)	43

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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74-1835

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SHATTUCK DENN MINING CORPORATION,

Plaintiff-Appellant,

- v. -

WILLARD J. LA MORTE,

Defendant-Appellee.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK

---

BRIEF OF DEFENDANT-APPELLEE,  
WILLARD J. LA MORTE

---

STATEMENT OF THE ISSUES

1. Did the District Court err in extending defendant-appellee, Willard J. La Morte's ("La Morte") §16(b) liability to include transactions occurring before August 24, 1965, which is the date two years prior to the commencement of this action and the statutorily mandated cut-off date for the recovery of §16(b) liability?

2. Did the District Court err in adopting \$10 as the per share value of the Shattuck Denn Mining Corporation ("Shattuck") stock La Morte received in return for his interest in Fireproof Products Co., Inc. ("Fireproof") pursuant to a merger of Fireproof into Shattuck and rejecting a \$15.41 per share value, as urged by La Morte?

3. Did the District Court err in holding La Morte liable for all the short-swing profits realized by three partnerships in which he had a minority participating interest, despite a specific finding that La Morte was not deputized by the partnerships to represent their interest on Shattuck's Board of Directors?

4. Did the District Court err in calculating La Morte's 16(b) liability by aggregating all Shattuck shares in which La Morte had an interest, either individually or as a member of the partnerships, and then matching purchases and sales across partnership lines, irrespective of the true ownership of the shares and despite the facts that La Morte never sold the shares he owned individually or received on the merger and that La Morte had only a minority interest in the shares owned by the partnerships?

5. Did the District Court err in denying La Morte the right to recover the monies he mistakenly paid

to Shattuck in excess of his actual 16(b) liability in reliance upon Shattuck's counsel's calculation of La Morte's 16(b) liability?

STATEMENT OF THE CASE

This action was commenced by Shattuck on August 23, 1967 pursuant to Section 16(b) of the Securities Exchange Act of 1934 to recover short-swing profits allegedly realized by La Morte while he was an officer and/or director of Shattuck in excess of what he had previously paid to Shattuck as his \$16(b) liability covering the same time period as alleged in the complaint.

After a trial, the District Court, by Judge Robert L. Carter, granted judgment in favor of Shattuck awarding the sum of \$4,875 which the Court found was the total short-swing profit realized by La Morte in excess of his previous payments. (A 396 - 405)\*

\* "A" refers to pages of the Joint Appendix

### Counter Statement of Facts

Within the time frame relevant to this action, July 1, 1963 through August 23, 1967, La Morte held minority interests in four partnerships, three of which, from time to time, traded the stock of Shattuck. The fourth partnership, Sanford Boulevard Venture, was merged into Willard La Morte Partnership, one of the other three partnerships, and engaged in no trades of Shattuck stock. (TP 193 -198)\*\* (Defendant's Exhibit E).

Of the remaining three partnerships, La Morte's equity interest was as follows:

<u>ENTITY</u>	<u>LA MORTE'S EQUITY INTEREST</u>
WILLARD LA MORTE, AGENT	11.18% at all times
JOINT STOCK TRADERS	26.39% at all times
WILLARD LA MORTE PARTNERSHIP	33.28% - 1964
" " "	34.03% - 1965
" " "	34.17% - 1966
" " "	35.30% - 1967

(See Defendant's Exhibits T,U,V,W and X, TP 193-233, TP 358-369 and Appendix B to Appellee's Brief).

\*\* TP refers to pages of the trial transcript. It should be noted that although the transcript is included as part of the Appendix, its pages have not been renumbered to correspond to their position in the Appendix.

The other members of these partnerships were members of La Morte's immediate and extended families, business associates and members of their families. (Defendant's Exhibits I, J, K, L, M, N, O & P).

La Morte's Form 4's (Plaintiff's Exhibits 1-10) were always prepared by Shattuck counsel, Donald Hain, Esq. (TP 16-34) who, as a result of this function, was well aware of La Morte's interest in the various partnerships. From time to time Hain would advise La Morte and the other officers and directors of Shattuck that certain corporate transactions required the filing of Form 4's. Whenever Hain prepared a Form 4 for La Morte the information upon which such filing was based was always readily and openly disclosed by La Morte. In no way or manner did La Morte seek to conceal his interests in the various partnerships from the corporation (TP 68 L 22; TP 71 L4) and, in fact, there was an intimate interrelationship among Hain who, in addition to being Shattuck's counsel, also advised La Morte with regard to legal matters and Shattuck's accountants who also provided accounting services to La Morte individually, and La Morte (Plaintiff's Exhibit 1; TP 46-56, 60, 76, 313-315).

On December 3, 1964, the directors of Fireproof and Shattuck approved, in principle, a merger whereby Fireproof would be merged into Shattuck and each shareholder of Fireproof would receive 13.21 shares of Shattuck in exchange for each share of Fireproof. (Plaintiff's Exhibit 13). On December 6, 1965 the Fireproof shareholders approved the merger. (Defendant's Exhibit AE). On December 7, 1965 Shattuck shareholders approved the merger (Plaintiff's Exhibit 13).

The exchange ratio of 13.21 shares of Shattuck for each share of Fireproof was fixed by the respective Boards for all time on December 3, 1964 and, in fact, was the same ratio that was ultimately used on February 1, 1966 when the shares were exchanged. (Plaintiff's Exhibit 13).

At the time of the merger La Morte individually held Fireproof shares. For these shares he received 19,101 shares of Shattuck. The merger shares received by La Morte were never sold until after the time period relevant to this action. (TP 211). Only one of the partnerships received any merger shares, that being Willard La Morte, Agent, which received 5,651 merger shares (Defendant's Exhibits C, D, E, F - Defendant's Exhibit T Transaction #39 and 40) (TP 355-56).

Pursuant to the merger, La Morte, his immediate family and other members of the La Morte family, delivered 64.2% of the Fireproof stock thereby delivering control of the corporation to Shattuck (TP 285-86).

POINT I

UPON THIS §16(b) FEDERALLY-CREATED RIGHT, PLAINTIFF'S RECOVERY FOR SHORT-SWING PROFITS IS JURISDICTIONALLY LIMITED TO PROFITS, IF ANY, WHICH DEFENDANT "REALIZED" ONLY WITHIN TWO (2) YEARS PRIOR TO THE COMMENCEMENT OF THIS ACTION.

---

Section 16(b) mandates:

Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer, if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized... (Emphasis supplied).

The emphatically expressed orbit of the right thus is confined to profits "realized" within two (2) years of the commencement of suit. This clear language by the Congress measures the full area of recovery jurisdictionally permitted by the Congress to the Courts.

Thus, the two-year capsule is no mere statute of limitations, capable of being waived or tolled. Rather, it is an indispensable component of the right itself and an absolute condition precedent to a 16(b) suit. See, Note: Limitation of

Actions - Fraud - Failure to File Required Report of  
Officer's Dealings in Shares of Corporation Tolls Limitation  
Period on Action under Section 16(b) of Securities Act. 61 Harv.  
L.Rev. 368 (1948)

This doctrine was best expressed in 1886 by the Supreme Court in The Harrisburg v. Rickards, 119 U.S. 199; 30 L.ed.358, (1886) when the Court, referring to a different statute, said (at p.214):

The statutes create a new legal liability with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit may be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.

\* \* \*

Time has been made the essence of the right, and the right is lost, if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.

This Court applied the Harrisburg doctrine in the case of Pollen v. Ford Instrument Co., Inc., 108 F.2d 762 (2nd Cir. 1940), wherein the plaintiffs sought recovery for an infringement of six patents. The lower Court dismissed the

complaint because the action was not commenced within six years after the claimed infringement, as required by the patent statutes, 35 U.S.C.A. Sec.70 (now 35 U.S.C.A., Sec. 286). Plaintiffs claimed that the limitation provision was tolled because the infringements had been concealed by the infringer in order to avoid suit. This Court affirmed the dismissal, stating (p.763):

[T]he rule that concealment postpones the running of limitations does not touch suits for patent infringement. The provision... is not a mere statute of limitation. It is part of the statute which creates the liability and gives the right of action. It is a condition on the right, not on the remedy, and it is not subject to the disabilities or excuses by which ordinary statutes of limitation may be avoided by a plaintiff.... Where the time for commencing action is prescribed in the statute which creates the liability and gives the right of action, the time is not extended by reason of fraud or concealment which might work an extension of ordinary statutes of limitation.... The distinction between ordinary statutes of limitation and statutes extinguishing the right of action, whether a logical distinction or not, is thoroughly settled. (Emphasis supplied)

In 1947, this Court again applied the Harrisburg doctrine in Osbourne v. United States, 164 F. 2d 767, 768 (2nd Cir. 1947), a case brought under the Admiralty Act and the Jones Act, wherein the Court, citing, inter alia, Pollen, held:

Generally, where a statute creates a cause of action which was unknown at common law, a period of limitation set up in the same statute is regarded as a matter of substance, limiting the right as well as the remedy. Filing a complaint within the prescribed period is a condition precedent to recovery, and the cause of action is extinguished after the running of the period.

\* \* \*

[T]he period of limitations under any of these acts will not be extended, as it would in the case of an ordinary statute of limitations, by a claimant's disability to sue because of infancy or insanity, or by a delay occasioned by the fraud of the defendant; and the defendant cannot waive the defense of the period of limitations. (Emphasis supplied).

Notwithstanding the weight of the judicial authority, two district court judges have found that the two-year limitation can be tolled.

In Grossman v. Young, 72 F.Supp. 375 (S.D.N.Y. 1947), the District Court, deciding a motion to dismiss the complaint, and hence construing the complaint in a light most favorable to the plaintiff - as it is bound to do on a motion to dismiss - held that the allegations of fraudulent concealment of defendant's short-swing profits, by refusing to file Form 4's until forced to do so by the Securities and Exchange Commission, having been deemed on the motion to be true, tolled the two-year time limitation.

Even considering such blatant fraud, the Court still strained to distinguish the case from the prevailing case law, specifically, The Harrisburg (supra) and Pollen v. Ford Inst. Co., Inc. (supra).

The distinction ultimately was based on the defendant's fraud, which enabled the Court to apply the holding in Holmberg v. Ambrecht, 327 U.S. 392; 66 Sup.Ct. 582, 90 L.Ed. 743 (1946), a case in which the Supreme Court announced that when a plaintiff has been injured by fraud, a federal statute of limitations may be tolled until the fraud is discovered. The District Court so held, notwithstanding the specific language in both the Pollen case and Osbourne v. U.S. (supra), that a time limitation, such as the one contained in §16(b), may not be tolled, even by fraud. (But see 61 Harvard L.R. 368, 369, casting doubt upon this decision).

It must be noted that in writing Holmberg, Mr. Justice Frankfurter reiterated the doctrine first advanced by the Supreme Court in Harrisburg v. Rickards, supra, when he said (at page 395):

If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end to the matter. The Congressional Statute of Limitations is definitive...The rub comes when Congress is silent.

For this proposition, Mr. Justice Frankfurter cited Herget v. Central Nat. Bank and Trust Co., 324 U.S. 4; 89 L.Ed. 656 (1945), wherein the Supreme Court, in analyzing a cause of action created under the Bankruptcy Act, specified at page 7:

Congress could have expressly restricted the field within which the two-year limitation (on the right to commence litigation) was to be operative had it so wished. Its failure to do so cannot be ignored.

It should be noted, further, that Holmberg dealt with a federal cause of action, for which the sole remedy is in equity and much of the Court's language indicates that its holding should be limited to equitable actions only.

Equity will not lend itself to such a fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court, long ago, adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' (pp.396,397)

Holmberg, of course, may be applied only where the defendant is guilty of fraud. It must be emphasized

that there have been neither allegations nor proof of fraud in the instant case.

In Blau v. Albert, 157 F.Supp. 816, (S.D.N.Y. 1957), the Court, in denying a motion to dismiss, cited Grossman v. Young, supra, as an authority for tolling the two-year limitation. However, Blau v. Albert, went way beyond Grossman in holding that "...the only fraud necessary to invoke the federal equitable doctrine is a violation of the statutory policy against trading by insiders." This is a remarkable statement, in that a careful reading of the case law shows that there is no authority whatsoever for the proposition advanced, which, if carried to its logical conclusion, would call for a tolling in every case where the plaintiff alleges a violation of Section 16(b). Moreover, the Grossman court found that the defendant's intentional failure to file Form 4's was the act of fraud which warranted the tolling, not his alleged violation of Section 16(b).

In the instant case the Court below found that the two-year statutory limit was tolled by the mere "...failure to provide proper information on Form 4 as required by Rule 16b...". (A 399) In reaching this conclusion the Court cited, without analysis, both Blau v. Albert and Grossman. It is respectfully submitted that the District Court erred since

the proposition set forth in Blau v. Albert is patently  
<sup>1</sup>  
erroneous and there are no facts in the record which would  
support a finding of fraud needed to activate the tolling  
concept set forth in Grossman.

In contrast with the Grossman and Blau  
v. Albert decisions, is Carr-Consolidated Biscuit Company  
v. Moore, 125 F. Supp. 423 (M.D. Pa. 1954), a well-reasoned  
and fully documented decision, holding at page 430, that  
the limitation period may not be tolled, "...even for  
fraud or concealment by the defendant...".

In its analysis of the relevant provisions  
of the 1934 Act, the Court noted at page 431, that "... when  
Congress wished to fix a special sanction for failure to file  
it spelled out the specific liability. When it desired to  
have the limitation period postponed, it specifically said so."  
With regard to postponing limitation periods, the Court re-  
ferred to Sections 9(e) and 18(c) of the Act, which provide  
for the limitation periods to commence, when the facts con-  
stituting the violation or cause of action are discovered:

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<sup>1</sup> It is interesting to note that, prior to the District  
Court's opinion herein Blau v. Albert never has been  
cited for the proposition that the two-year limitation  
may be tolled upon the mere failure to file Form 4's since  
it was decided in 1957.

In view of the foregoing, considering the plain and unambiguous language of §16(b), the Congress intended a different situation to prevail under 16(b). Based upon a fair interpretation of the Section we conclude that the words mean exactly what they say. (id. 432).

Even if the argument of the plaintiff, that the two-year limitation upon this federally-created right under §16(b) may be tolled (TP 264), it cannot be tolled by mere ignorance of evidence on which to establish a claim. See Movie Color Limited v. Eastman Kodak Company, 288 F. 2d. 80,87 (2nd Cir.1961). The federally-created right, particularly here, where it is enforceable only in the Federal Courts and where its creating statute, by express language, limits suits thereon to a two-year period from the realization of profit, there must exist clear and convincing evidence of concealment or misrepresentation to effect a tolling of the statute. See Movie Color Limited v. Eastman Kodak Company, id. 87.

Upon all the evidence, there was no withholding of information, and the certified public accountants for the plaintiff were fully apprised upon an annual basis, of all of the transactions engaged in by the partnerships. It is manifest that the level of proof required of the plaintiff to bring about the elimination of the two-year period has not been reached at all. Movie Color Limited v. Eastman Kodak Company, supra, id. 88

It is equally emphatic that the complaint does not allege fraud, concealment or misrepresentation, but asserts

only that the subject transactions came to the "attention" of the plaintiff in 1967.

The extraordinary twist by which the omission to file a Form 4 with the Securities and Exchange Commission and with the American Stock Exchange could constitute wilful concealment plainly is an exercise in judicial legislation. If Congress intended that the failure to file a Form 4 automatically would bring about the elimination of the two-year period, it would have said so in the same manner as it stated that wilfulness under Section 16(b) is of no moment in the application of liability.

Again, even if tolling the statute were conceived to be possible, plaintiff has failed to meet that burden as it was required to do. See International Railways of Cent. Am. v. United Fruit Co., 373 F.2d 408, 414 (2nd Cir. 1967).

Other cases have been urged as authority for tolling the two-year statutory limitation. In Atlantic City Electric Co. v. General Electric Co., 312 F. 2d 236 (2nd Cir. 1962), this Court, in an anti-trust case, specified that the Holmberg doctrine is exceptionally strong. However, in Footnote "9", on page 240, the Court added the following strong caveat:

Our opinion here is, of course, confined to the effect of fraudulent concealment on the running of the Statute of Limitations and does not extend to cases involving delayed discovery where there has been no fraudulent concealment.

In Westinghouse Electric Corp. v. Pacific Gas and Electric Co., 326 F.2d 575 (9th Cir.1964), also an anti-trust case, the Court cited fraudulent concealment for invoking Holmberg. It should be pointed out that Westinghouse involved a cause of action created to redress injury to any person by reason of anything forbidden in the anti-trust laws (15 U.S.C. §15). While Section 16(b), on the other hand, is a specially-created forfeiture statute having no penal or remedial qualities.

In Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231; 3 L.Ed. 2d 770(1959), the Supreme Court held that a defendant may be estopped from pleading a statutory period of limitation if there is proof that he made affirmative misrepresentations upon which plaintiff relied, to his detriment. However, it must be emphasized again, there were no such affirmative misrepresentations in the instant case.

Glus also has been cited for the proposition that the pertinent language in The Harrisburg was dictum. This argument is not persuasive. As Judge Rifkind pointed

out in Grossman v. Young, 72 F. Supp. 375, 379, while discussing the dictum in Holmberg (supra):

...when dictum of so high a source illumines a path which leads in the direction of more fully achieving the underlying purpose of the statute as I perceive it, I readily yield to the invitation - though command is absent - to follow it.

In sum, the District Court has ignored and has cast aside, as if non-existent, the words of the statute, a proposition for which there exists no valid authority. Even assuming that tolling of the §16(b) statute were possible, the absence of proof of fraud and concealment vitiates all basis for turning the statute aside.

There is no evidence, nor are there even allegations, that Mr. LaMorte fraudulently concealed the short-swing trades of the two partnerships in which he had an interest at the relevant time.

The evidence is:

(a) Donald Hain, Esq., in his capacity as counsel for Shattuck, was aware of the defendant's interest in the partnerships (TP 54, L.16-25; TP 55, L.2; TP 56, L.14-21).

(b) Furthermore, Messrs. Hain and La Morte maintained their respective offices in the same suite during the relevant time frame (TP 75, L. 5-14). These two men were in constant communication with each other (TP 62, L.7-14), and Hain even prepared La Morte's Form 4's, for filing with the Securities and Exchange Commission (TP 81, L.15-17), and the information necessary for the preparation of the Form 4's always was provided voluntarily by the defendant (TP 70, L.4,5).

(c) It also should be noted that the Officers and Directors of Shattuck had access to the corporate transfer sheets, which would reflect any trades in the names of the partnerships in which Mr. La Morte had an interest. Cf. Carr-Consolidated Biscuit Company v. Moore, supra, p. 432.

Mr. Hain, counsel for the plaintiff, calculated the defendant's alleged Section 16(b) liability based on

short-swing profits dating back to June 30, 1963 (TP 102, L. 12-25); TP 103, L. 203). But plaintiff's maximum right of recovery, in all events, is against short-swing profits realized no earlier than August 24, 1965, since this litigation was commenced on August 23, 1967.

In view of the evidence, it must be concluded that the defendant did not fraudulently conceal any short-swing trades or profits, and therefore, no possible reason exists for considering a tolling of the two-year limitation of Section 16(b). Therefore the Court below erred by including purchases or sales of Shattuck stock predating August 24, 1965 in its calculation of La Morte's Section 16(b) liability.

POINT II

THE CRITICAL VALUATION DATE OF  
THE SHARES OF FIREPROOF PRODUCTS  
CO., INC., IS DECEMBER 31ST, 1964

Concededly, the exchange of Fireproof shares for Shattuck shares was approved by the Board of Directors of Shattuck on December 3, 1964, as a consequence of which, the ratio of 13.21 shares of Shattuck for one (1) share of Fireproof firmly was established. That ratio was predicated upon the book value of Fireproof as of December 31, 1964. (See Letter to Shareholders from the Chairman of the Shattuck Board, dated November 5, 1965, p. 1 of Plaintiff's Exhibit 13).

The merger plan, as approved by Shattuck in December, 1964, fixed and capsulized the merger plan whereby, regardless of the fluctuations in the market prices of the Shattuck stock on the American Stock Exchange, the Fireproof stockholders would receive only 13.21 shares. In like fashion, regardless of the increase or decrease in the book value of Fireproof shares, during the interval between December, 1964 and the actual physical exchange of the stock, the Fireproof shareholders would receive only 13.21 shares of the Shattuck stock.

It is of no moment in the circumstances herein,

where the lines were firmly drawn, and the intention of the parties firmly fixed, to seek out points of time as critical, where those subsequent points merely confirmed what already had been determined.

All the center points of decision, as arrived at in December, 1964, contained and merely were mechanically carried out thereafter (TP 277, L.5-9). One need only look to the letter of transmittal by the Chairman of the Board of Shattuck (Plaintiff's Exhibit 13) to see the plain emphasis of the action taken by Shattuck, through its Directors, in December, 1964.

There is no question that the book value of Fireproof, on February 1, 1966, was greater than it was on December 31, 1964 (Defendant's Exhibit B). However, the increase of this value did not increase the right of the Fireproof shareholders to obtain more Shattuck shares than 13.21. In like manner, the fact that on December 3, 1964, the mean price of Shattuck was \$10.75 on the American Stock Exchange, and the mean price on February 1, 1966 had decreased to \$8.75, did not impair in the slightest degree the exchange ratio whereby Shattuck would be required to pay anything more than 13.21 shares for one share of Fireproof.

Thus, when we look to determine the value of what the Fireproof stockholders paid to obtain Shattuck shares - even if this were against the interests of the defendant La Morte - we properly determine the value on February 1, 1966, as of December, 1964. This is so because the Exchange on February 1, 1966 merely gave effect to a value previously, and long since immutably, determined. (TP 278, L. 20-24).

Thus, within the four walls of the merger plan, values for all purposes and for all times, were fixed as of December 3, 1964.

The date of the physical exchange of the stock has been rejected by the courts as a critical date. Cf. Newmark v. R.K.O., 425 F. 2d 348 (2nd Cir. 1970); Champion Home Builders Company v. Jeffress, 352 F. Supp. 1081 (E.D.Mich. 1973).

The respective Boards of Directors evidenced their agreement to make December 3, 1964 the critical valuation date for Fireproof shares, by making no provision for adjustments for subsequent changes in value either of Fireproof or Shattuck shares (TP 276, L.12-16). The subsequent approval of

the merger by Shattuck shareholders was nothing more than a pro forma endorsement of the action of their Board of Directors and added nothing to the previously determined valuation of the Fireproof shares.

Certainly La Morte and the other Fireproof shareholders became irrevocably bound to exchange their shares for the Shattuck shares no later than December 7, 1965 when the merger was approved by Shattuck stockholders. Therefore, December 7, 1965 is the latest possible date that the Court should use in considering the valuation of the Shattuck shares received by LaMorte. See Kern County Land Company v. Occidental Petroleum, 411 U.S. 582 and Provident Securities Co. v. Foremost - McKesson, Inc., CCH Federal Securities Law Reports, Paragraph 94, 811 (9th Cir. 1974).

However, in his letter of transmittal attached to the Shattuck proxy statement (Plaintiff's Exhibit 13) in the middle of next to the last paragraph, Shattuck's President in explaining the manner in which the exchange ratio was determined states that "[t]he most important single ratio was book value (\$141.85) of Fireproof as of December 31, 1964 as compared with market value (\$10.75) of Shattuck Denn stock as of December 3, 1964 (which was the date on which the Shattuck

Denn Board of Directors approved the proposed transaction in principle)...".

Accordingly, it is clear that regardless of the date that La Morte was irrevocably bound to exchange his Fireproof shares, the terms of the merger dictated that once approved the operative elements of the exchange, most important of which was the exchange ratio based upon the book value of Fireproof in relation to the market value of Shattuck was fixed for all purposes as of December 3, 1964. Therefore, the only date that can be used properly to determine the value of the Shattuck shares received by La Morte is December 3, 1964. In no event is February 1, 1966 of any significance except for bookkeeping purposes.

It is well settled that upon an exchange of stock in a merger, the value of the shares acquired (Shattuck) is fixed by the value of the shares delivered (Fireproof). See Mueller v. Korholz, 449 F. 2d 82 (7th Cir. 1871); Park & Tilford v. Shulte, 160 Fed. 2d 984 (2nd Cir. 1947); Kramer v. Ayer, 317 F.Supp. 254 (S.D.N.Y. 1970); Blau v. Lamb, 163 F.Supp. 528 (S.D.N.Y. 1958).

It is respectfully submitted that the District Court's finding that the value to be attributed to Shattuck

shares acquired pursuant to the merger, is the market value of Shattuck stock on February 1, 1966 (A 401-402) is erroneous. The applicable rule is that the market value of the shares received in a merger is relevant as some evidence of the value of the consideration given in exchange, only when the value of that consideration otherwise cannot be ascertained. See B.T. Babbitt, Inc. v. Lachner, 332 F. 2d 255 (2nd Cir. 1964). Courts have looked to the market value of the shares received in an exchange of securities in isolated instances only, such as when parties have stipulated that there was no market for the shares given up, B.T. Babbitt, Inc. v. Lachner, supra. When evidence of the value of the shares given up was "noticeably thin", Marquette Cement Mft. Co. v. Andreas, 239 F.Supp. 962 (S.D.N.Y. 1965).

However, when expert testimony regarding the valuation of the shares given up is received, it always is accorded weight by the Court. See Newmark v. R.K.O. General, Inc., 305 F.Supp. 310, 313 (S.D.N.Y. 1969); aff'd, 425 F.2d 348 (2nd Cir.1970); Fistel v. Christman, 135 F.Supp.803, 831-832 (S.D.N.Y. 1955).

In the instant case, the District Court heard extensive expert testimony regarding the valuation of the

Fireproof shares given in exchange for the Shattuck shares. Therefore, since there is adequate evidence of the value of the consideration given for the Shattuck shares here in question, the market price of Shattuck stock, on February 1, 1966, or any other date, is of little moment. Therefore, we must look to the expert testimony, since the Fireproof stock was not traded publicly.

The testimony of the experts for both parties reveals that their methods of appraisal were similar. However, the conclusions reached were vastly disparate, in that plaintiff's expert valued the Fireproof shares at \$100 (TP 143, L.16), while defendant's expert valued the same shares at \$200 each (TP 285, L.14).

The fact that the experts used different dates of valuation does not account for their diverse conclusions, since the book value of Fireproof shares on February 1, 1966 (plaintiff's expert's valuation date) was higher than the book value on December 3, 1964 (defendant's expert's valuation date) yet plaintiff's expert was still able to find a value significantly than that which existed on December 3, 1964.<sup>2</sup>

<sup>2</sup> It should be noted that neither expert considered book value as the proper valuation of Fireproof shares. (TP 156, L.18-22; TP 282, L.12-14).

The difference in appraised value must be attributed to the information used by the experts in their approaches to value (TP 305, L.20-25; TP 306, L. 209).

Specifically, plaintiff's expert, John Russell, used only one approach to value, i.e., the price-earnings ratio. He did not include the value of vacant land owned by Fireproof as a non-operating asset (TP 181, L.5-9), nor did he add a control premium to the value of the Fireproof shares (TP 185, L.24-25; TP 186, L.206; TP 186, L.12-18).

On the other hand, defendant's expert, Hugh A. MacMullan, III, used three (3) approaches to value, i.e., return on net worth, price-earnings ratio and composite approach, and he included both the non-operating asset and the control premium in his valuation (Defendant's Exhibit ).

The vacant land owned by Fireproof was a non-operating asset carried on the Fireproof financial statements at a value of \$200,000 while its market value on December 31, 1964, was at least \$475,000 (TP 294; TP 296, L.2-16).

To exclude this non-operating asset in the valuation of the Fireproof stock is to present a misleading picture of what Fireproof was giving up in exchange for Shattuck stock, and therefore, such valuation does not reflect the fair value of the Fireproof shares.

Furthermore, although Mr. Russell recognized the efficacy of a control premium and maintains that he considered the control factor in his valuation (TP 184, L.16-25), a careful reading of his methods of appraising Fireproof (TP 144-156) indicates that he gave no weight at all to the control element.

Conversely, Mr. MacMullan assigned a control premium of 25% to the block of stock delivered by the La Morte family. The concept of a control premium is well recognized by appraisers of intangible assets. See Mueller v. Korholz, supra, p. 98, and certainly is applicable to the instant merger, where the La Morte family exchanged 64.2% of the outstanding Fireproof shares.

In evaluating MacMullan's conclusions it is significant to note that one of the three approaches to value he used was the price-earnings ("PE") ratio approach, the only approach to value used by Shattuck's expert. In comparing

the three different approaches to value Mr. MacMullan stated that the composite approach was most reliable (TP 284-85). It should be emphasized that in his Conclusions of Value (Defendant's Exhibit S, p.5) MacMullan finds Fireproof's highest net worth by the PE ratio approach, which net worth is \$2,280,040. Furthermore, by the composite approach, Fireproof's net worth is found to be \$2,029,868, substantially below the PE ratio net worth. Nevertheless, in his Total Concluded Value MacMullan has rounded off Fireproof's net worth to \$2,000,000, which is more than one-quarter of a million dollars less than the net worth pursuant to the PE ratio approach. Accordingly, it is clear that MacMullan's valuation of the Fireproof shares in issue was conservative and quite objective and should therefore be credited as the proper valuation.

Accepting the valuation of \$200 per each Fireproof share exchanged by LaMorte, it follows that the price paid per Shattuck share in accordance with the 13.21:1 exchange, is \$15.14.

This value is applicable only to the 5,651

shares of Shattuck acquired by the Willard J. La Morte Agent partnership, on February 1, 1966 (Defendant's Exhibit T, transaction numbers 39 and 40), as none of the merger shares held by the defendant individually were involved in the short-swing trades (TP 332; TP 33, L.209) and the Willard and Joint Stock Traders J. La Morte, Partnership/organization never received any merger shares (Defendant's Exhibit V).

Of all the shares sold by Willard J. La Morte, Agent, during the relevant period, the highest price received was \$11.88 (Defendant's Exhibit T, transaction number 61). Therefore, no profit, short-swing or otherwise, was realized on the purchase and sale of the Shattuck shares acquired in the merger with Fireproof.

### POINT III

ONLY LA MORTE'S PRO-RATA SHARE OF ANY PARTNERSHIP PROFITS REALIZED ON TRANSACTIONS IN SHATTUCK STOCK WAS SUBJECT TO RECAPTURE BY SHATTUCK UNDER § 16(b).

The discussion in this point is limited in its scope to discussing why the district court was wrong in not limiting Shattuck's recapture of alleged "short-swing" profits from LaMorte, to LaMorte's pro rata share in the partnerships whose trading gave rise to his § 16(b) liability. Therefore, any mention herein of short-swing profits "realized" by the partnerships must be understood to be made solely for the purpose of discussion and not as a concession that a particular partnership realized any recapturable profits as a result of a given trade. Point IV, infra, will discuss the proper procedure to follow in computing § 16(b) liability herein - another area in which the district court erred.

In August, 1967, and in total reliance upon the accuracy of the computations by Shattuck's accountants, LaMorte paid to Shattuck exactly what it claimed was his § 16(b) liability.

Prior to that, and in 1963, when Shattuck's accountants had previously computed LaMorte's §16(b) liability, they had properly sought only to recover his pro rata share of partnership "short-swing" profits. In 1967, Shattuck computed LaMorte's liability and demanded payment based, not upon his pro-rata share of partnership short-swing profits, but, rather, upon total partnership short-swing profits..(TP 57,L 22 - TP 58, L 6). Not knowing the erroneous basis of the 1967 computations,

but seeking to discharge his recognized obligation under § 16(b), LaMorte, although grossly overcharged, paid the full amount demanded of him. See, Point V re: LaMorte's right to restitution.

It is now a well settled principle of securities law - with respect to partnerships which have as one of their members a corporate director who is subject to § 16(b) liability - that, unless the partnership has deputized said member to represent it on the corporation's board of directors, the issuer corporation may recapture from the partnership only the non-deputized partner's pro rata share of any short-swing profits "realized" by the partnership. Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969); Blau v. Lehman, 286 F.2d 786 (2d Cir. 1960), affirmed, 368 U.S.403 (1962); Rattner v. Lehman, 193 F.2d 564 (2d Cir. 1952); Marquette v. Andreas, 239 F. Supp. 962 (S.D.N.Y. 1965).

The impact of such decisional law upon this case must be made emphatically clear. Absent a finding of deputization, the issuer has no right to recapture more than the dollar value of the director's pro rata participation in the partnership's profit on the transaction from the partnership! Put another way, only if the director was the partnership's deputy, could the issuer recapture 100% of the "short-swing profit realized" on the transaction by the partnership, and, then, from the total partnership, not merely from one partner.

In total disregard of the above, as well as the fact

that it had specifically found that LaMorte was not the deputy of the partnerships (A 403), and, implicitly, that Shattuck was only entitled to a pro rata recovery from the partnerships, the district court awarded Shattuck a 100% recovery, against LaMorte, personally.

This rather novel, if not anomalous, and inequitable result came about when the court rejected LaMorte's attempt to have restitution, from Shattuck, of the gross overpayment he made with respect to discharging his § 16(b) liability in 1967.

Totally disregarding the fact that the Pre-Trial Order specifically provided that the pleadings were deemed amended to conform to the issues, one of which specifically was:

Is [LaMorte] liable for the full profits of the partnerships with respect to the transactions in question? (A 110),

the district court, while recognizing the overpayment (A 404), nevertheless, reasoned that Equity prevented LaMorte from having restitution because to allow the same would prejudice Shattuck (A 404, 405).

It is respectfully stated that the district court's analysis of the issues in the case, let alone its perception of where the equities were to be found, was, at best, erroneous and constitute grounds for reversal.

The court, in refusing to allow restitution to LaMorte, concluded that to do so would be to deprive Shattuck of its right, lost by the passage of time, to recover short-swing profits from other members of the partnerships (A 404).

There are several things wrong with such reasoning. First of all, it is predicated upon Shattuck's naked assertion that it had such a right initially. (A 403).

LaMorte states that not only is the record totally devoid of any proof of such right; even the court noted, when commenting upon the record, and with respect to one Mr. Cameron (also a Shattuck director and a one-time member of one of the partnerships herein involved):

Whether he was a member of the partnership, as well as a member of the Board during the critical period in question, has not been developed. Nor has the relationship of the other [partners] to the plaintiff corporation been developed. (A 404).

Even, arguendo, if Shattuck had such a right and further, had introduced evidence to prove it, LaMorte, having no control over who Shattuck named as a defendant in its § 16(b) suit, cannot be made to suffer the consequences of Shattuck's poor initial judgment.

Plaintiff, having full knowledge of the existence and composition of the partnerships, and having full control over its own lawsuit, voluntarily chose not to name the partnerships as defendants. Having so elected, plaintiff now would cast on Mr. LaMorte the consequences of its decision. It is a strange doctrine that throws upon a defendant the burden of plaintiff's choice of defendants.

In the context of § 16(b), plaintiff, in effect, chose to release the partnerships from the liability and should not now be permitted to cast itself in the role of a misled litigant which has been denied a full recovery through no fault of its own.

Shattuck had both the burden of proving a prior right to proceed against others to recapture § 16(b) profits and the loss of that right directly attributable to LaMorte. Shattuck totally failed to meet either burden.

In essence, what the court's determination did was to shift, without any factual basis, the consequences of Shattuck's failures to meet its evidentiary burdens to LaMorte - whose only failure herein was to rely upon the integrity and accuracy of Shattuck's accountant's totally inaccurate computations as to what he owed initially.

In so doing, not only has the court committed reversible error; it has unjustly enriched Shattuck at LaMorte's expense. It has converted a statute whose purpose was to curb insider profits, into an instrument for exacting a penalty from LaMorte. Again, at best, such reasoning works a perversion of the statutory purpose in arriving at its result and must be rejected.

Limiting the court's reasoning to the facts in the record, once it found that LaMorte was not the deputy of the partnerships (A 403), it was error to allow a recapture of more than LaMorte's pro rata share of the partnerships'

"short-swing" profit and it was also error not to allow restitution to LaMorte of all sums paid in excess of his pro rata share - whatever that sum is determined to be. See, Point IV, infra.

Lastly, by consenting to the Pre-Trial Order (A 105-110) and the trial of the issue of pro rata liability, Shattuck waived any objection to, and assumed the consequences of, a determination of that issue adversely to its interest - be it denominated "counter-claim" or "restitution;" see, Point V, infra.

POINT IV

THE DISTRICT COURT'S METHOD OF DETERMINING  
LA MORTE'S 16(b) LIABILITY WAS INCORRECT

It is unclear from the opinion below how the District Court determined that LaMorte realized a short-swing profit of \$4,875. However, counsel is aware of the method used to calculate LaMorte's liability since prior to filing his opinion the District Judge enlisted the assistance of counsel in making these calculations. In the course of an in camera conference the Court outlined its decision and requested that counsel compute the 16b liability resulting from the \$10 valuation of the merger shares. Pursuant to the Court's specific instructions LaMorte's counsel with the consent of Shattuck's counsel, took plaintiff's Exhibit 12 (the 1967 matchings of short-swing trades prepared by Shattuck) and substituted the \$10 valuation of the merger shares for the \$10.75 value appearing therein. The result of course was the conclusion that LaMorte had realized an additional \$4,875 in short-swing profits. A copy of the letter from La Morte's counsel to the District Judge detailing the means by which the final calculations were made is set forth infra as Appendix A to Appellant's brief.

La Morte respectfully asserts that the District Court's method of calculating short-swing profits was patently erroneous. It must be remembered that plaintiff's Exhibit 12 was prepared at the direction of Donald Hain, Esq., Shattuck's counsel, in concert with accountants who simultaneously acted for Shattuck and La Morte. In preparing Exhibit 12, Hain admits that he indiscriminately aggregated all of the acquisitions of Shattuck stock made by La Morte and by the partnerships in which La Morte had an interest. He then aggregated all of the sales of Shattuck stock made by the partnerships (La Morte individually did not sell any Shattuck stock, TP 252). After the purchases and sales were aggregated they were indiscriminately matched against each other without regard to which entity was responsible for any given purchase or sale and without regard to the true ownership or beneficial interest of the shares purchased or sold. (TP 35-37, 331-332 and accountant's cover letters to Exhibits 11 and 12). The foregoing procedure for calculating 16(b) liability is grossly inaccurate and without basis in law.

The conceptual errors in calculating La Morte's 16(b) liability based on Exhibit 12 are five fold:

Initially, a partnership's short-swing profit can be ascertained only by matching its own trades, one against the other. Matching a trade by one partnership against a trade by a different partnership cannot establish a profit for either entity.

Secondly, since none of the defendant's direct holdings in Shattuck stock were traded during the relevant time frame, these shares may not be matched against any sales of Shattuck stock by either of the partnerships in which defendant had an interest, as this could not be considered a "profit realized by him", as required by Section 16(b).

Thirdly, defendant, as an insider, may not be held liable for the entire partnership profit, but solely for the proportionate share of the profit. See Point III, supra.

Fourthly, February 1, 1966 is used throughout Exhibit 12 as the purchase date of the merger shares. This is manifestly wrong since the proper purchase date of the merger shares is the date the Fireproof shareholders became irrevocably bound to the merger. See Kern County Land Company v. Occidental Petroleum, 411 U.S. 587 (1973); Provident Securities Co. v. Fremont-McKesson, Inc., CCH Federal Securities Law Reports ¶94, 811 (9th Cir. 1974). While the District Court made no finding with respect to the purchase date of the merger shares, it is plain that the shares were purchased for 16b purposes no later than December 7, 1965, the date the Shattuck shareholders approved the merger, thereby irrevocably binding the respective corporations and their shareholders to the merger and the consequential exchange of shares.

Lastly, 16b specifically defines short-swing trades as purchases and sales or sales and purchases "...within any period of less than six months...". Accord, Stella v. Graham-Paige Motors Corporation, 132 F.Supp. 100 (S.D.N.Y. 1955), aff'd, 232 F.2d 299 (2d Cir 1956), Cert.denied, 352 U.S.931. Based on the definition of a

short-swing trade it is clear that Exhibit 12 contains another conceptual defect in that it matches at least two trades which occur without the prescribed time limit. On the first page of the Exhibit 12 matchings a purchase of 315 shares on November 19, 1963 matched against a sale of a like number of shares on May 18, 1964, a period of exactly six months and hence not a short-swing trade. On the second page of Exhibit 12 matchings a sale of 200 shares on December 31, 1964 is partially matched against a sale of 500 shares on June 30, 1965, a period of more than six months.

The method of aggregating all purchases between July 1963 and August 1967 and matching them against sales in the same time frame although appealing in its simplicity, can not be substituted for the proper method of calculating 16(b) liability.

It is well established that there is only one method for calculating 16(b) liability. This method of calculation was plainly stated by this Court in 1943 in the landmark case of Smolowe v. Delendo Corporation, 136 F. 2d 231 (2nd Cir.)

In Smolowe, this Court analyzed the various alternative methods suggested by the parties for determining the amount of short-swing profits realized by an insider and determined that the proper and exclusive method of calculation was to match trades on the basis of the lowest price in against the highest price out, provided that the relevant trades were

made within a six month time period. id. p.239. See also Gratz v. Slaughter, 187 F. 2d 46 (2d. Cir. 1951), cert.denied, 341 U.S.920 (1951); Adler v. Klawans, 172 F.Supp.502 (S.D.N.Y. 1958) Aff'd. 267 F.2d 840 (2nd Cir. 1959); Graham v. Stella Paige Motors Corporation, supra; Walet v. Jefferson Lake Sulphur Co., 202 F. 2d 433 (5th Cir. 1953); Blau v. Allen, 163 F.Supp. 702 (S.D.N.Y. 1958), and Painter, Federal Regulation of Insider Trading, 25-40 (1968).

Having previously found that La Morte was not a deputy of the partnerships and that he would ordinarily be liable only for his pro rata share of the partnership's short-swing profits (A 403,404) the District Court then held that due to a failure to timely interpose a defense La Morte will be deemed liable for the total short-swing profits of the partnerships (A 404).

Accepting the District Court's conclusion for the moment, it still cannot follow that the short-swing profits realized by the various partnerships may be determined by lumping all purchases and sales of the partnerships together with the acquisition by La Morte, individually, of the merger shares and then matching these transactions

willy-nilly against each other if they happen to fall within a less than six month time period.

Since La Morte did not sell any of the 19,101 Shattuck shares he received by way of the merger (TP 211, L.3-10) it must follow that these shares could not have been the basis for the realization of any profit, short-swing or otherwise.

It is manifest that the only proper way to determine La Morte's 16(b) liability is to segregate the transactions of the various partnerships and then to match the purchases of each partnership only against sales of that partnership occurring within less than six months of the purchase. This is the only method of matching short-swing trades which will accurately reflect the partnerships' short-swing profits.

Once the partnerships' short-swing profits have been determined then La Morte's participation in each partnership during the relevant time period must be considered and applied against the total partnership profit each year in issue. It is significant to remember this was the general procedure followed by Shattuck's counsel in 1963 when he computed La Morte's short-swing profits as of that time (TP 57-59).

In the course of one of the post trial in camera conferences La Morte's counsel outlined the foregoing method of computing La Morte's 16(b) liability based on the District Court's announced conclusion that the merger shares would be valued at \$10 each and that Shattuck would recover short-swing profits going back to July 1963. Shortly thereafter La Morte's counsel submitted a series of schedules illustrating the proper method of computations. This series of schedules together with the cover letter explaining the schedules and submitted therewith are set forth infra as Appendix B to Appellee's Brief.

As Appendix B illustrates, La Morte individually did not trade Shattuck stock from June 30, 1963 through August 23, 1967. The only partnerships trading the stock during this time frame were Joint Stock Venture, Willard La Morte, Agent and Willard La Morte, Partnership. Furthermore, La Morte's equity interest in Willard La Morte Partnership varied from year to year.

Appendix B was prepared prior to the filing of the District Court's opinion but was based on that opinion as it was then understood. The important factors used in compiling Appendix B were the following:

- \$10 valuation of merger shares;
- 16(b) liability extending back to July 1, 1963 rather than being limited to August 24, 1965, two years prior to the commencement of the action;
- La Morte's pro rata liability; and
- Matching trades only within entity lines.

Appendix B clearly shows that the total short-swing profits earned by the partnerships between July 1963 and August 1967 was \$32,914.56 and that La Morte's pro rata share of those profits was \$10,027.96 plus interest of \$974.47, totalling \$11,002.43. Nevertheless, Shattuck's counsel led La Morte to believe that his liability was \$37,036.04 and accordingly he paid that amount plus interest of \$3,159.49, totalling \$40,195.53 paid by La Morte to Shattuck in August 1967.

Therefore, it can be determined that even using \$10 as the merger share price and permitting Shattuck to recapture short-swing profits back to 1963 (both of these conclusions La Morte maintains are erroneous and serve to enlarge his actual 16(b) liability) La Morte over paid Shattuck \$29,193.10, which must be returned to him together with interest.

Obviously, computations contained in Appendix B

are illustrative only. The definitive computation of La Morte's 16(b) liability must await the determination of all the issues raised in this appeal since the resolution of these issues will necessarily dictate how La Morte's 16(b) liability will be computed.

Therefore, La Morte respectfully submits that computation of his 16(b) liability must be remanded to the District Court for determination consistent with this Court's resolution of the other issues on appeal.

POINT V

LA MORTE IS ENTITLED TO RECOVER INTEREST  
ON THE SUM PAID TO THE PLAINTIFF IN  
EXCESS OF HIS SECTION 16(b) LIABILITY.

In 1967, defendant paid to plaintiff \$40,195.53, which purported to represent the short-swing profits "realized by him". This sum was paid in the mistaken reliance upon the calculations made pursuant to the direction of the plaintiff. These calculations were completely erroneous, as previously discussed.

The applicable rule of restitution may be found in Section 19, American Law Institute's Restatement of the Law of Restitution:

A person who has paid money to another because of an erroneous belief, induced by a mistake of fact that he was thereby performing in whole or in part a duty to the payee, other than a contract duty, is entitled to restitution of the amount so paid if such duty did not exist.

Comment "a" to the Section indicates that the rule pertains both where no "original liability" existed and where an existing liability had terminated. Both circumstances are found in this action.

Comment "d" is particularly pertinent to this litigation, and permits restitution where:

(a) person may mistakenly believe in the existence of facts which would create in him a statutory duty to another; (and) ... money (ls) paid in such mistaken belief.

A second rule of the law of restitution applicable to this case may be found in Section 20, American Law Institute's Restatement of the Law of Restitution:

A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty... is entitled to restitution of the excess.

Comment "a" indicates that this rule pertains both to the situation where the mistake is of the amount due, and the amount paid.

The purpose of Section 16(b) is not to impose a penalty for insider trading. Congress considered this in previous drafts of the bill and rejected provisions which imposed criminal penalties. (See H.R. 7952 and S. 2693, 73rd. Cong., 2nd Sess. (1934). The refusal of this Court to permit restitution would result in the imposition of a penalty, thereby changing the purpose of the statute.

On the basis of all the evidence herein, the defendant is entitled to a return of the funds paid by him in excess of his §16(b) liability, with interest thereon from August, 1967.

### CONCLUSION

For all of the reasons set forth above, the District Court's judgment must be reversed and it is respectfully requested that the following relief be granted:

1. Limiting La Morte's 16(b) liability to short-swing profits, if any, resulting from trades occurring on or after August 24, 1965, two years prior to the commencement of this action.
2. Valuing the Shattuck shares obtained through the merger with Fireproof at \$15.41 per share.
3. Limiting La Morte's 16(b) liability to his pro rata share of the short-swing profits realized by the partnerships in the relevant time frame.
4. Remanding the calculation of La Morte's 16(b) liability to the District Court with instructions to determine such liability by matching purchases of each partnership only against sales of the same partnership and to be otherwise consistent with the opinion of this Court.

5. Granting La Morte restitution of all the monies paid to Shattuck beyond his actual 16(b) liability together with interest.

6. Any other relief that to this Court seems just, necessary and proper in the premises.

Respectfully submitted,

FELDSHUH & FRANK  
Attorneys for Defendant-Appellee,  
La Morte

Donald A. Derfner  
Robert Bartels,  
Of Counsel

APPENDIX "A"

January 25, 1974

Hon. Robert L. Carter  
United States District Judge  
United States Court House  
Foley Square  
New York, New York 10007

Re: Shattuck Denn Mining Corp. v. La Morte  
67 Civil 3222

Dear Judge Carter:

Pursuant to Your Honor's request, I have reviewed plaintiff's Exhibit 12 in evidence and I have identified each matching of purchases and sales of Shattuck Denn Mining Corp. ("Shattuck Denn") stock involving shares acquired on February 1, 1966. It is presumed that each of these shares were obtained by Willard La Morte and the several partnerships pursuant to the acquisition of Fireproof Products, Inc. by Shattuck Denn.

After identifying the relevant trades, I deleted the previously established cost of \$10.75 per share and I recalculated the defendant's alleged short-swing profits using Your Honor's value of \$10.00 per merger share as the cost thereof. It should be noted that in accordance with Your Honor's instructions, I did not undertake to rematch any of the short-swing trades.

Using this procedure, I established that an additional \$4,875.00 of short-swing profit would have been realized by the defendant.

After completing the foregoing calculations, I telephoned plaintiff's counsel, Alan Palwick, Esq. and advised him of the aforementioned sum. Mr. Palwick stated that he would consent to my calculations.

Hon. Robert L. Carter  
January 25, 1974

As Your Honor indicated in the course of our conference regarding the recalculation of defendant's alleged short-swing profit, the submission of these figures is not to be deemed a waiver, in any way, of the defendant's contention that plaintiff's Exhibit 12 is inaccurate for the following reasons:

1. The "merger shares" were not correctly valued.
2. The purchases made by each partnership were not separately matched against only the sales made by that same partnership, but, rather, were matched against sales made by the other partnerships, as well as against shares held by the defendant, individually.
3. The calculations were not limited to the defendant's pro rata share of the short-swing profits earned by the respective partnerships.
4. The matchings contained purchases and sales occurring six months or more apart.
5. The matchings contained purchases and sales which occurred prior to two years preceding the commencement of the action.

As I previously told your Law Clerk, Mr. Dalton, shortly after our last conference with Your Honor, the defendant, Willard J. La Morte suffered a major heart attack and was hospitalized for a substantial period of time. As a result, I was unable to meet with him for the purpose of obtaining his approval of the foregoing calculations and therefore, my submission of same to the Court has been delayed until today.

I hope Your Honor will accept my apologies for this tardy submission.

Most Respectfully Yours,

DAD:ej

Donald A. Derfner

copy to: Alan Palwick, Esq.  
521 Fifth Avenue  
New York, New York 10017

**APPENDIX "B"**

November 15, 1973

Hon. Robert L. Carter  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: Shattuck Denn Mining Corp. v.  
La Morte 67 Civ. 3222

Dear Judge Carter:

In accordance with Your Honor's decision, as we understand it, in the above referenced cause, and as an aid to the Court, enclosed please find the following:

1. Schedule "A" Willard J. La Morte - Partnership  
Schedule "A" Willard J. La Morte - Agent  
Schedule "A" Joint Stock Traders:

These schedules reflect all purchases and sales of Shattuck shares by each of the foregoing entities during the relevant time period arranged and numbered in chronological order.

2. Schedule "B" Willard J. La Morte - Partnership  
Schedule "B" Willard J. La Morte - Agent  
Schedule "B" Joint Stock Traders:

These Schedules reflect the correct matchings of any and all purchases and sales made by the foregoing entities within a period of less than six months which resulted in short-swing profits. Said transactions are arranged in chronological order and the transaction numbers which appear on these Schedules refer back to the numbers assigned to each transaction on Schedule "A".

3. Schedule "C" Willard J. La Morte - Partnership  
Schedule "C" Willard J. La Morte - Agent  
Schedule "C" Joint Stock Traders:

These Schedules reflect the interest on all transactions which resulted in short-swing profits. The interest was calculated separately for each of the foregoing entities for the

Hon. Robert L. Carter  
November 15, 1973

period commencing with the date of the transaction and ending on August 1, 1967, the date the defendant paid \$40,195.53 to the plaintiff.

4. Summary Schedule:

This Schedule reflects the following:

- a) The total short-swing earned by each entity during the relevant time period;
- b) the defendant's proportionate interest in each entity, broken down by year, where relevant;
- c) the defendant's pro rata share of the short-swing profits;
- d) interest on the defendant's pro rata share of short-swing profits;
- e) defendant's total 16(b) liability;
- f) the amount of overpayment by the defendant;
- g) the amount due and owing by plaintiff to the defendant as restitution for overpayment;
- h) interest on the amount of restitution.

As the Court will note, the transactions appearing on the foregoing Schedules go back to 1963 and were not matched across entity lines but only within each entity. Furthermore, we have not submitted Schedules with regard to the entity known as "Sanford Boulevard Venture" because this entity made no short-swing trades in the relevant time period which resulted in a profit.

I hope that these Schedules will be of assistance in finally determining the liability of the parties herein.

Respectfully yours,

DAD:ej

Enclosures

cc: Alan Palwick, Esq.  
Burns, Van Kirk, Greene &  
Kafer, Esqs.

Donald A. Derfner

521 Fifth Avenue  
New York, New York 10017

## SUMMARY SCHEDULE

<u>Total Profit</u>	<u>Entity</u>	<u>Willard J. La Morte's</u> <u>Share</u>	<u>Profit</u>	<u>Interest</u>
\$				
4,585.60	Willard J. La Morte, Agent	11.18%	= \$ 512.66	\$ 37.16
1,330.52	Joint Stock Traders	26.39%	= 351.16	67.01
	Willard J. La Morte, Partnership			
6,368.08	For year 1964	33.28%	= 2119.44	387.07
3,826.30	" 1965	34.03%	= 1302.20	163.83
<u>16,804.06</u>	" 1966	<u>34.17%</u>	<u>+ 5742.50</u>	<u>319.40</u>
\$ 32,914.56			\$10027.96	\$ 974.47

\$37,036.04	Amount Paid August 1, 1967	\$3159.49
	Total Amount	\$40,195.53

\$ 10,027.96	Actual Payment that should have been paid	974.47
	Total Amount \$11,002.43	

**Total to be recovered:**

**\$40,195.53**

11,002.43

**\$29,193.10**

Interest from 8/1/67 to 11/15/73  
1930 days = 31.7099% x \$29,193.10

9,257.10

**TOTAL DUE:**

**\$ 38,450.20**

Willard J. La Morte. Partnership

Purchases

Sales

Trans- action Number	Date	Number of Shares	Total Price	Price per Share	Number of Shares	Total Price	Price per Share
1	7/8/64	500	\$4075.00	8.15			
2	7/8/64	500	4075.00	8.15			
3	7/8/64	200	1630.00	8.15			
4	7/28/64	500	3822.50	7.65			
5	8/11/64				100	\$ 757.91	7.58
6	8/13/64				300	2459.30	8.19
7	8/14/64				100	856.87	8.57
8	8/14/64				200	1689.02	8.44
9	8/19/64				300	2644.86	8.82
10	8/28/64				300	2644.86	8.82
11	9/3/64				300	2830.39	9.43
12	9/4/64				200	2008.65	10.04
13	9/4/64				200	2033.35	10.16
14	9/16/64				100	943.45	9.43
15	9/28/64				100	979.58	9.79
16	9/28/64				200	1911.70	9.56
17	9/29/64				100	931.12	9.31
18	10/1/64				200	2008.65	10.04
19	10/2/64				300	3235.61	10.78
20	10/2/64				300	3235.61	10.78
21	10/5/64				1000	11,094.59	11.09
22	10/9/64				100	1004.32	10.04
23	10/27/64				900	10,374.75	11.53
24	10/27/64				900	10,374.75	11.53
25	10/29/64				200	2330.22	11.65
26	10/30/64				200	2330.23	11.65
27	11/16/64				1100	12,371.10	11.24
28	11/17/64				352	3832.18	10.89
29	11/30/64				200	2157.06	10.78
30	12/3/64				300	3309.85	11.03
31	12/4/64				200	2181.81	10.90
32	12/4/64				100	1090.90	10.90
33	12/9/64				300	3111.87	10.37
34	1/6/65				200	2206.57	11.03
35	1/7/65				200	2181.81	10.91
36	1/26/65				200	2627.14	13.14
37	1/28/65				100	1387.78	13.88
38	1/28/65				100	1387.78	13.88
39	1/29/65				200	2837.44	14.18
40	5/19/65	500	5274.40	10.55			

# Schedule A

## Purchases

## Sales

Transaction Number	Date	Number of Shares	Total Price	Price per Share	Number of Shares	Total Price	Price per Share
41	7/1/65	100	\$ 789.75	7.90			
42	7/1/65	600	4725.88	7.88			
43	7/2/65	900	6931.02	7.70			
44	7/6/65	400	3083.25	7.71			
45	7/6/65	1,500	11,088.80	7.39			
46	9/3/65	500	4075.00	8.15			
47	9/3/65	2,500	20,375.00	8.15			
48	11/5/65				200	\$ 1787.99	8.94
49	11/18/65				100	906.37	9.06
50	11/19/65				100	893.99	8.94
51	11/27/65				100	918.74	9.13
52	12/16/65				100	807.41	8.07
53	12/17/65				200	1590.06	7.55
54	1/6/66				100	856.87	8.57
55	1/6/66				100	856.87	8.57
56	1/14/66				100	930.49	9.30
57	1/18/66				100	832.48	8.32
58	2/4/66				200	1916.24	9.58
59	3/30/66				100	949.95	9.50
60	3/31/66				100	919.38	9.19
61	4/1/66				100	892.80	8.93
62	4/15/66				100	921.52	9.22
63	4/20/66				400	3761.66	9.40
64	4/20/66				600	5948.36	9.91
65	4/21/66				100	1052.40	10.52
66	4/21/66				500	4934.79	9.87
67	4/21/66				400	4107.49	10.27
68	4/22/66				300	3014.10	10.01
69	4/28/66				500	5061.93	10.14
70	5/6/66				200	2064.64	10.32
71	5/11/66				500	5388.72	10.78
72	5/11/66				100	1104.32	11.04
73	5/12/66	200	2085.22	10.43			
74	5/17/66				200	2170.31	10.85
75	5/17/66				200	2195.06	10.98
76	5/17/66				600	6753.35	11.26
77	5/18/66				100	1054.22	10.54
78	5/18/66				100	1041.84	10.42
79	5/23/66	400	4011.66	10.03			
80	6/2/66				1000	11,037.26	11.04

## Schedule A

## Willard J. La Morte, Partnership

## Purchases

## Sales

Trans- action Number	Date	Number of Shares	Total Price	Price per Share	Number of Shares	Total Price	Price per Share
81	6/9/66				500	\$ 5704.23	11.41
82	6/9/66	400			800	9436.14	11.80
83	6/10/66				200	2455.94	12.28
84	6/16/66				100	1153.22	11.53
85	6/16/66				100	1103.72	11.04
86	6/24/66				100	1102.72	11.03
87	6/24/66				100	1091.34	10.91
88	7/13/66				400	4332.49	10.83
89	7/29/66				1700	14,892.00	8.76
90	8/15/66				100	943.35	9.43
91	8/18/66	200	\$ 1882.50	9.41			
92	8/26/66	200	1705.76	8.53			
93	8/26/66	600	5268.70	8.78			
94	8/29/66	600	4965.76	8.28			
95	8/31/66				200	1744.66	8.72
96	9/1/66	400	3133.76	7.83			
97	9/2/66	800	5964.52	7.46			
98	9/6/66	200	1428.00	7.14			
99	9/6/66	100	727.00	7.27			
100	9/7/66				400	3223.57	8.06
101	9/8/66				300	2437.51	8.12
102	9/12/66				300	2597.06	8.66
103	9/12/66				300	2396.93	7.99
104	9/26/66				100	799.25	7.99
105	9/26/66				100	785.96	7.86
106	9/26/66				100	772.67	7.73
107	9/26/66				100	759.39	7.59
108	9/26/66				100	756.10	7.46
109	10/3/66				100	719.52	7.20
110	10/3/66				100	706.24	7.06
111	2/2/67				1400	15,788.09	11.21
112	2/3/67				200	2354.45	11.77
113	2/7/67				800	9665.28	12.08
114	2/8/67				800	10,135.48	12.67
115	2/9/67				300	3791.53	12.63
116	2/15/67				1200	15,834.36	13.19
117	2/16/67				800	11,051.24	13.81
118	2/27/67				300	3346.03	11.13
119	2/28/67				200	2181.19	10.91
120	3/1/67				300	3216.54	10.72

WILLIAM G. BILBO, JR., GOVERNOR

## Sales

-60-

Willard J. La Morte, Partnership  
Matching

-61-

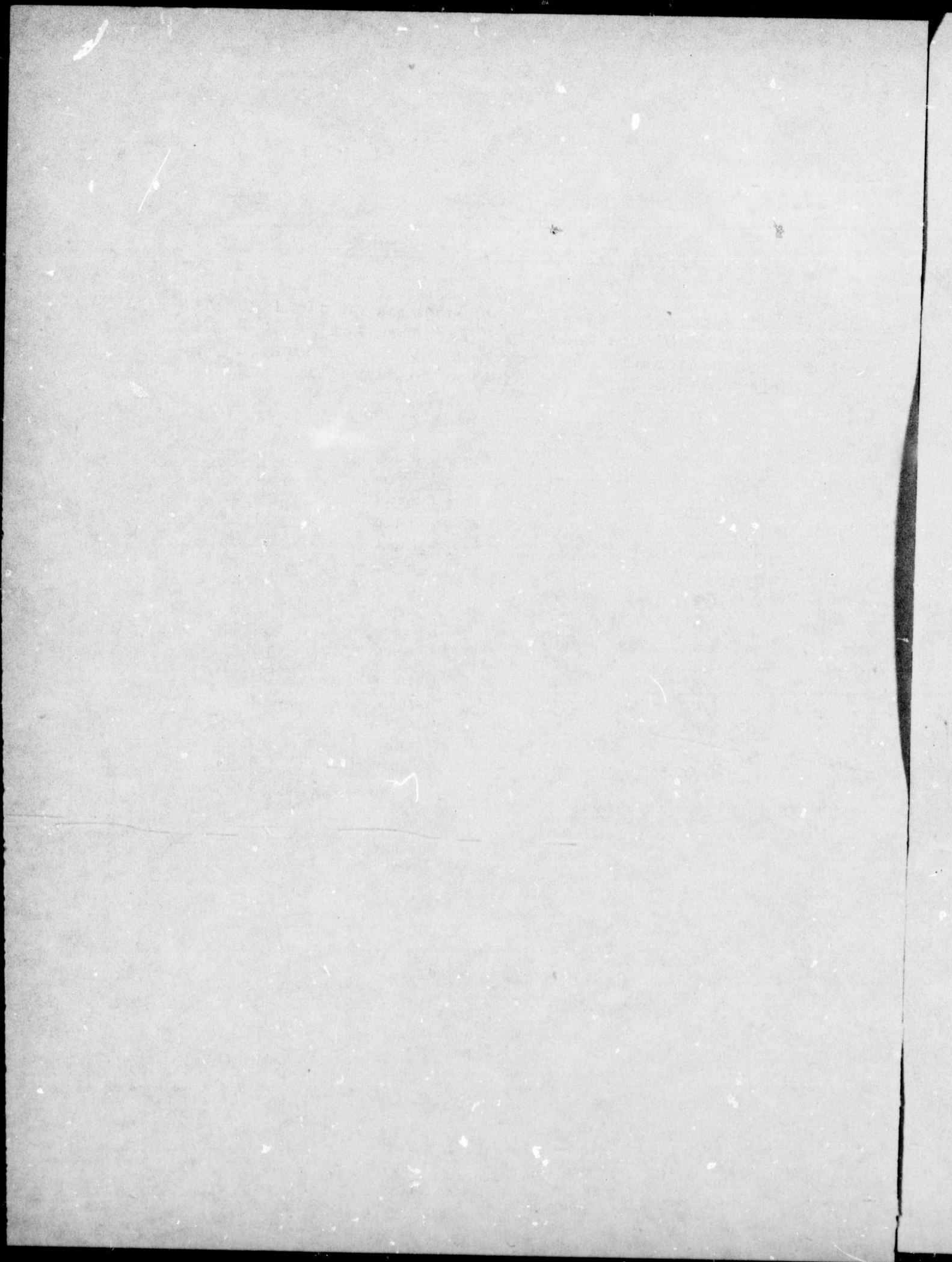
SCHEDULE "C"

Willard J. La Morte, Partnership

Calculation of Interest @ 6% which has accrued on the liability under Section 16(b) of the Securities Exchange Act of 1934 with respect to transactions in Shattuck Denn Mining Corporation Capital Stock from the first transaction to August 1, 1967.

Aggregate Interest to 8/1/67

<u>Amount</u>	<u>Date</u>	<u>Time in Days</u>	<u>Rate %</u>	<u>Amount</u>
4104.44	7/8/64	1118	18.3799	\$ 754.39
2263.64	7/28/64	1098	18.0511	408.61
1441.60	5/19/65	802	13.1849	190.07
1591.85	7/1/65	760	12.4944	198.89
215.65	7/6/65	755	12.4122	26.77
577.20	9/3/65	692	11.3765	65.66
1988.00	9/6/66	324	5.3263	105.89
4897.48	9/2/66	328	5.3923	264.08
2142.24	9/1/64	327	5.3759	115.16
2896.24	8/29/66	336	5.5238	159.98
3157.54	8/26/66	339	5.5732	175.97
643.50	8/18/66	346	5.6882	36.60
804.28	5/23/66	431	7.0856	56.99
274.78	5/12/66	442	7.2665	19.97
<u>5,998.44</u>				<u>\$2,579.03</u>



US COURT OF APPEALS: SECOND CIRCUIT

SHATTUCK,  
Plaintiff-Appellant.

against

LA MORTE,  
Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 8th day of November 1974 at 521 Fifth Ave., New York

deponent served the annexed

Brief

upon

Burns, Van Kirk, Greene & Kafer

the in this action by delivering <sup>3</sup> true copy <sup>ies</sup> thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 8th  
day of November 19 74

*Victor Ortega*  
Print name beneath signature

VICTOR ORTEGA

*Robert T. Brin*

ROBERT T. BRIN  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 31 - 0418950  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES MARCH 30 1975